

EXHIBIT 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
FOURTH DIVISION

-----X		
FREEMAN McNEIL, <u>et. al.</u>	:	
	:	File No. 4-90-476
Plaintiffs,	:	
	:	
v.	:	
	:	
NATIONAL FOOTBALL LEAGUE, <u>et. al.</u>	:	
	:	
Defendants.	:	
-----X		

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

AFFIDAVIT OF JEFFREY L. KESSLER

JEFFREY L. KESSLER being duly sworn, deposes and says:

1. I am a member of the firm of Weil, Gotshal & Manges. I make this affidavit to set forth, for the Court's convenience, the record evidence which demonstrates that defendants have repeatedly mischaracterized the deposition testimony and documentary evidence before the Court in an apparent attempt to manufacture issues of fact where none exist. While all of these purported "fact issues" would be immaterial to the pending summary judgment motion in any event, the Court should be aware of the true state of the record, which is set forth below, especially since many of the defendants' factual

assertions are made without any citations at all. Additional factual misstatements by the defendants are described in the accompanying affidavits of Eugene Upshaw, Charles Grantham, Joseph A. Yablonski and Timothy English.

I. THE DEPONENTS UNIVERSALLY TESTIFIED THAT
THE ABANDONMENT OF BARGAINING IS PERMANENT
AND NOT A "PLOY" BY THE NFLPA

2. Despite the impression defendants give by quoting inadmissible newspaper articles (and citing to the page of the deposition transcript where the article is introduced as an exhibit), the testimony of the sixteen NFL players deposed by defendants was universal in affirming that the NFLPA's abandonment of collective bargaining rights was permanent and irreversible, and not designed to put pressure on the NFL to achieve a new collective bargaining agreement. For example, the NFL cites newspaper quotes (from the period November to December 1989) attributed to Tom Rathman, Bubba Paris, Warren Moon, Tunch Ilkin, and Stephen Bono as purported support for the claim that the NFLPA can still collectively bargain. (NFL Br. at 5-7). The following is the actual testimony of the players taken during the last five weeks:

a) Tom Rathman testified:

Q. Did you think when you signed the petition you were ending collective bargaining permanently?

A. Well, by not having a union, I mean, you can't negotiate. (Rathman 10) (Tab 1).

* * *

Q. And is it your view that there is no way to get a new contract at this stage?

A. Not now, because no one represents us.

Q. Were you told when you signed the Petition that it would permanently end collective bargaining in the NFL?

A. Yes. (Rathman 14-15) (Tab 2).

b) Bubba Paris testified:

At no time, since I've been a part of the whole process, has it ever been mentioned as a threat to decertify, have there ever been mentioned that the possibility we would reinstate. [sic]. I mean, the thing that was so chilling about the whole set of circumstances is, that, once it happened, it would be so final. (Paris 115) (Tab 3).

c) Warren Moon, whom the NFL defendants repeatedly cite, testified:

Q. Did you understand that the decision to do so [end the collective bargaining relationship] was irreversible?

A. Yes.

Q. You thought that once the bargaining relationship was ended it would be ended forever?

A. Yes. (Moon 33) (Tab 4).

* * *

Q. Was it your view that the union was trying to gain some leverage to improve its bargaining position?

A. No. (Moon 66) (Tab 5).

d) Tunch Ilkin testified:

Q. Was there discussion about, hey, what happens if we want to shift back to become a collective bargaining agent?

A. Yeah. That question was asked, but we said we can't do that. We are no longer -- and we don't -- we don't want to be the collective bargaining agreement -- bargaining agent.

Q. Do you understand that the NFLPA cannot restructure itself again to become a collective bargaining unit?

A. Yeah. I haven't really given that much thought. But I didn't have any intent when we -- at this point, we really -- I don't think we wanted to ever be a collective bargaining agent again. (Ilkin 21-22) (Tab 6).

* * *

Q. Do you remember anybody telling you that [the amended] by-laws can be changed back if we want to?

A. No, I don't remember that either.

Q. Yeah.

A. I don't think we did that, I think we were changing our by-laws for good. (Ilkin 78) (Tab 7).

e) Stephen Bono testified:

Q. And did you understand that [the] surrender of the bargaining rights was for all time, in perpetuity?

A. Yeah. (Bono 10) (Tab 8).

* * *

Q. And when you signed this petition, was it in fact your desire permanently to end collective bargaining with the NFL clubs?

A. Yes. (Bono 25) (Tab 9).

* * *

Q. So, I have to ask you again, what do you understand decertification to mean? What have you been told it means?

A. I understand it to mean that the union is no longer a bargaining agent.

Q. And do you understand that to be a permanent and unchanging state of affairs?

A. Yes. (Bono 30) (Tab 10).

Indeed the NFL defendants actually approached Messrs. Bono and Rathman to get them to sign pre-prepared affidavits contradicting the above testimony. They both refused.

Bono 36-7, 39 (Tab 76); Rathman 20-21 (Tab 77).

3. Defendants also point to some out of context testimony taken from the depositions of Brian Noble, Mike Kenn and Steve Jordan. (NFL Br. at 17-18). But here is the testimony that the NFL left out:

a) Brian Noble testified:

Q. Was there any questions asked about whether decertification would make it impossible for football players to reach a collective bargaining agreement with owners?

A. The question was just asked would there -- is there a possibility that a CBA could still be negotiated.

Q. And what was the answer?

A. No.

Q. Is there any way that the players as a group could reach an agreement with the owners as a group on the terms and conditions of employment for National Football League players?

A. No.

Q. You think it's impossible today for that to happen?

A. Yes. (Noble 41-43) (Tab 11).

b) Mike Kenn testified:

Q. Was it discussed during this [Executive Committee] conversation that the action the Board -- the Committee was planning was final and irrevocable?

A. We knew that, yes, we knew that there were certain ramifications by decertifying and if we did, you know that the players could possibly lose their health insurance and things of that nature, and they knew once we made this decision that there was no turning back and it is in perpetuity, I mean we knew exactly what we were doing.

Q. So the point was made during this conversation that once the NFLPA decertified itself that it would never again be involved in collective bargaining with the NFL clubs?

A. That is correct, would no longer represent the players in any form of collective bargaining, we would no longer be in that business. (Kenn 17-18) (Tab 12).

c) Steve Jordan testified:

[W]hat was mentioned . . . is that we are no longer a collective bargaining representative so as far as getting a collective bargaining agreement through the association, that cannot happen As far as us coming back later saying let's collectively bargain or something like that, that would not occur because of the fact that we were no longer bargaining representatives. (Jordan 76) (Tab 13).

4. Indeed, the testimony was uniform on this subject. Not only Gene Upshaw and Doug Allen, the Executive Director and Assistant Executive Director of the NFLPA, but every player deposed by the defendants (and they chose which players to depose) testified that the actions taken by the NFLPA to end its role as a collective bargaining representative were permanent and irreversible and were not a tactic to get a new collective bargaining agreement. For instance, Executive Committee member Luis Sharpe testified as follows:

Q. Let me ask it this way, I guess. If the NFL Management Counsel [sic] came to the NFLPA with an incredible deal which gave the NFLPA everything it wanted -- free agency immediately upon contract expiration, whatever else -- is it your belief that the NFLPA would not accept that deal?

A. You mean now?

Q. Right.

A. We wouldn't even look at it.

Q. You would not look at it?

A. No.

Q. Even if it was everything you want?

A. We wouldn't even look at it.

Q. Do you think that's a good thing or bad thing?

A. It's the only thing we can do.

Q. Why is that?

A. Because we don't bargain anymore. (Sharpe 20) (Tab 14).

See also Davis 19-21, 32 (Tab 15); Pagel 27, 42, 55 (Tab 16); Reasons 34, 45, 54 (Tab 17); Adickes 23-24, 36 (Tab 18); Chandler 22, 25 (Tab 19); Jones 59, 66, 69 (Tab 20); Mecklenburg 52 (Tab 21); Upshaw 132, 143, 234 (Tab 22); D. Allen 42-44 (Tab 23). Moreover, the players testified that they fully understood the seriousness and adverse ramifications of abandoning collective bargaining rights, including the likelihood that they would lose benefits, lose the grievance arbitration process, and expose themselves to unilateral changes in terms of employment by the defendants. See Mecklenburg 33, 36-37 (Tab 24); Kenn 17-18, 30 (Tab 25); Sharpe 25 (Tab 26); Bono 20-21 (Tab 27); Noble 29, 37 (Tab 28). Indeed, they testified as to how the NFL owners have in fact reduced player benefits since the NFLPA ended its role as collective bargaining agent. See e.g. Sharpe 62 (Tab 29); Paris 86 (Tab 30); Reasons 48, 90-91 (Tab 31).

II. THE RECORD DOES NOT SHOW THAT THE NFLPA IS
FOLLOWING THE LEAD OF THE NBPA WHICH ENTERED
INTO A NEW COLLECTIVE BARGAINING AGREEMENT

5. Defendants suggest that the NFL players are following a course taken by the National Basketball Players Association ("NBPA") which, according to the NFL's unsupported assertion, obtained a favorable collective bargaining agreement after abandoning bargaining rights. (NFL Br. at 9-10). The true facts, however, as set forth in the accompanying affidavit of Charles Grantham, are that the NBPA, unlike the NFLPA, never actually took the step of abandoning collective bargaining rights -- a critical distinction about which a number of the deponents testified. See Bono 17 (Tab 32) ("I don't see how it can be similar. The NBA players threatened; the NFL actually did it."); Moon 69-70 (Tab 33) ("we also knew that once we went through the process of actually voting and signing, that it was irreversible The National Basketball Association -- I don't think they ever went through the whole process"); Pagel 48-49 (Tab 34) ("the difference was, is, they [the basketball players] were just threatening to do it and we decided that we were going to do it"). Other players, including those cited by the NFL as supporting its "NBA argument," testified that they were either unaware of the events in the NBA or that the NBA situation had no influence on the NFLPA's decision. See Reasons 88-89 (Tab 35);

Paris 111-115 (Tab 36); Kenn 34-35 (Tab 37); Mecklenburg 45 (Tab 38); Sharpe 50-51 (Tab 39); Davis 33-34 (Tab 40).

III. THE RECORD SHOWS THAT DEFENDANTS HAVE OMITTED OR MISCHARACTERIZED FUNDAMENTAL CHANGES IN THE ACTIVITIES OF THE NFLPA SINCE IT RENOUNCED COLLECTIVE BARGAINING

6. Incredibly, defendants argue that the NFLPA's operations "remain unchanged" (NFL Br. at 10-14) and that "the NFLPA is still functioning in a fashion virtually identical to its manner of operation before the renouncement of bargaining rights." (NFL Br. at 26). While defendants recite a litany of irrelevant things that have not changed (such as the fact that the NFLPA didn't fire any of its secretaries), they have omitted or distorted the record evidence of fundamental changes in the functioning of the NFLPA:

A. No Collective Bargaining

7. First, and most importantly, the NFL defendants do not cite or dispute any of the extensive record evidence that there has been no collective bargaining by the NFLPA since its renunciation of collective bargaining rights. Indeed, as testified to by Eugene Upshaw and described in the accompanying Upshaw Reply Affidavit, the NFLPA has repeatedly turned down the NFL's requests to bargain since November, 1989 -- yet the NFL has never filed any unfair labor practice charge with the NLRB over this refusal. Upshaw Reply Aff. ¶¶ 3-8; Upshaw 230-32 (Tab 41).

Why? Because the NFL defendants obviously realize that the NFLPA is no longer a union. Indeed, since the NFLPA has renounced collective bargaining, the NFL defendants have made several unilateral changes in the players' terms and conditions of employment -- such as the lengthening of the NFL season -- which disprove their assertion that the NFLPA is still the collective bargaining representative of the players. *Id.*

B. No Agent Regulation

8. Another fundamental change that has been made in the operations of the NFLPA concerns player agents. The NFL contends that "testimony by agents is consistent that the NFLPA's disclaimer of bargaining rights has had no effect on the way they conduct their business" (NFL Br. at 12) and that "[t]he activities of player agents. . . have been completely unaffected." (NFL Br. at 27). This is completely false. One of the essential characteristics of a collective bargaining organization is the fact that no individual negotiations over wages, hours, or working conditions can take place without its permission. Thus, prior to the NFLPA's abandonment of bargaining rights, agents were allowed to represent players only on certain mandatory conditions set by the NFLPA. If an agent failed or refused to conform to those conditions, he could be prevented from representing any players. As described in the record, the NFLPA's mandatory registration of agents and regulation of agent

conduct is no longer in place. Rather, the NFLPA has only a voluntary set of guidelines which the agents may or may not adhere to. Unlike before, agents are now no longer required to be certified by the NFLPA, no longer required to abide by the NFLPA's regulations, no longer required to adhere to maximum fee percentages, and no longer required to use the NFLPA's standard form of agent-player agreement. Thus, by letter of January 16, 1990, the NFLPA informed player agents that:

[T]he NFLPA has changed its relationship with agents who represent professional football players. Effective November 6, 1989, the NFLPA no longer is the bargaining representative of NFL players for wages, hours and working conditions. It is no longer a requirement, therefore, that NFL player contract advisors be certified by the NFLPA in order to represent players in individual contract negotiations with NFL clubs.

Upshaw Reply Aff. Exh. 11 (Tab 42). Agent Tony Agnone testified as follows:

- Q. With respect to the agent membership in the NFLPA and the code of conduct, what is your understanding of any differences that there might be between the way it is now and the certification system that existed prior to November 1989?
- A. Well, this is a voluntary, you're voluntary complying now at this point, as opposed to where it was mandatory before. You know, several things. One is that they always never had any control over what you could charge for a rookie, but they did have a situation where they could -- in fact, they would tell you that this is the amount you could charge for a veteran.

Q. You're speaking of agent fees, fees that you can charge the player?

A. Fees, right, before. Now you can charge them whatever you want. Also, they had documents you were supposed to use with the players. That's no longer the situation. Any grievance procedures was mandatory that you notify the NFLPA. It's not on it. So there's significant changes in terms of what's done. And, frankly, in my case I'm not in compliance with the directives that were there before as opposed to today. (Agnone 68-69) (Tab 43).

* * *

Q. Let me just ask you, Mr. Agnone, to make sure your testimony was clear about the fees. Prior to November of 1989, did the NFLPA mandate what fee an agent could charge a player?

A. They had guidelines, specific guidelines.

Q. Were those guidelines mandatory?

A. Yes. You had to be within those guidelines.

Q. Is that the same on the system now?

A. No, now it's voluntary.

Q. You can charge whatever you want?

A. You can charge whatever you want.

Q. You mentioned that the system is voluntary. Let me ask you, do you have an understanding of what happens if you were not a member, a contract advisor member of the Players Association? Would you still be able to represent players?

A. Yes, because like I'm currently able to do it now, I'm not a member.

Q. Would that have been the case prior to November of 1989?

A. No. In fact, they would notify -- a team would notify you that you weren't on the certified list or they'd call the NFLPA and find out if you were on the certified list. (Agnone 70-71) (Tab 44).

See also Bauer 18, 20-21, 85 (Tab 45); Mills 60 (Tab 46); Cindrich 29 (Tab 47); Steinberg 16-17 (Tab 48); Johnson 28-29 (Tab 49). The NFLPA's inability to prevent any agent from representing any player is further confirmation of its termination as a union.

C. The Record Evidence Shows That The NFLPA Has No Control Over Individual Player Salary Negotiations

9. The NFL contends, without record citations, that "the NFLPA continues, through the agents, to engage in the bargaining of player compensation and continues to intervene directly, from time to time, as it did before, in individual salary negotiations." (NFL Br. at 27). The only support given for this assertion anywhere in the NFL's brief is an inadmissible television quote from Gene Upshaw, quoting Mr. Upshaw's opinion about the contract negotiations of Houston Oilers' player Lamar Lathon. (NFL Br. at 13). Again, defendants do not cite to the testimony on this issue. That testimony, by Mr. Lathon's agent, Tom Williams, states that Mr. Williams has known Mr. Upshaw personally for many years, that he called Mr. Upshaw, and that

neither Mr. Upshaw nor anyone from the NFLPA influenced his negotiations in any way. Williams 49-55, 72-73, 125-27 (Tab 50). See also Upshaw 214-16, 222 (Tab 51).

10. With respect to the purported ability of the NFLPA to control individual salary negotiations, no agent testified that this was the case. Rather, the testimony was exactly the opposite. Agent Tony Agnone, who represents approximately 35 NFL players, testified:

Q. [S]ince November 1989, has anyone from the NFLPA told you that you had to negotiate a certain salary for a player?

A. The NFLPA, no one in that department would be stupid enough to tell me what I should ask for and what I shouldn't ask for. And if they were, obviously I would probably tell them in no uncertain terms where to get off. (Agnone 67-68) (Tab 52).

See also Agnone 74-76 (Tab 53). Similarly, Marvin Demoff, who represents between 40 and 50 NFL players, testified:

Q. Did anyone at the NFLPA ever express an opinion to you as to what one of your clients should be able to achieve in a particular negotiation?

A. No.

Q. Since the decertification, have you received any input from the NFLPA on the -- on either offers that you made or offers that were received by your clients?

A. No. (Demoff 14) (Tab 54).

Leigh Steinberg, who represents approximately 50 NFL players, testified:

Q. In negotiating on behalf of your clients, have you, even one time, been influenced in the slightest by any direction, or attempt to direct you, from the Players Association as to how you should negotiate or for what price you should attempt to get for your client, what salary?

A. Absolutely not. The Players Association never gets involved in the specifics of our negotiations. It never has; it's not their, you know, business. (Steinberg 95-96) (Tab 55).

See also Johnson 16-17 (Tab 56); Cindrich 22-25 (Tab 57); Mills 18 (Tab 58); Bauer 33 (Tab 59); G.B. Allen 24-25 (Tab 60).

D. The Record Shows That The NFLPA Does Not Handle Or Pay For Arbitrations Since Its Renunciation Of Collective Bargaining

11. Contrary to the misleading footnote in the NFL's brief (NFL Br. at 11 n.8), the testimony and the accompanying affidavit of Eugene Upshaw show that the NFLPA no longer represents players in arbitration proceedings; ~~nor~~ does it pay for lawyers to represent individual players in disputes occurring after the NFLPA's abandonment of bargaining rights. Upshaw Reply Aff. ¶¶ 9-11; Bauer 22 (Tab 61); Johnson 27 (Tab 62); Cindrich 67 (Tab 63); Demoff 10-11 (Tab 64); Agnone 44-45 (Tab 65); Mills 21-22 (Tab 66); Pagel 16 (Tab 67). Indeed, the only funding from the NFLPA is in the form of a special trust set up to reimburse the fees of outside lawyers who took over grievances filed before

November 6, 1990, which the NFLPA had previously handled. Upshaw Reply Aff. ¶ 10.

E. The Record Shows That The NFLPA
Is Not A Member Of The AFL-CIO

12. Defendants note that Eugene Upshaw is a Vice President of the AFL-CIO (NFL Br. at 8, n.4) and then contend that "[t]o defendants' knowledge, no leaders of trade associations hold high-ranking position within that organization." What defendants fail to mention are the fourteen pages of testimony on this issue by Mr. Upshaw (Upshaw 9-23) (Tab 68) wherein he makes clear that he is an inactive officer of the AFL-CIO only in his status as President of the Federation of Professional Athletes (Upshaw 13), whose members include a collective bargaining organization -- the Major Indoor Soccer League Players Association. (Upshaw 18). The NFLPA is not a member of the Federation of Professional Athletes, nor of the AFL-CIO. (Upshaw 9).

F. The NFLPA's Change In Tax Status Is
Not "Temporary"

13. Another mischaracterization of the record by defendants is the assertion that the NFLPA changed its tax status only temporarily "pending the outcome of the Powell decision." (NFL Br. at 14). Defendants' only cite for this assertion is a statement by Gene Upshaw which they know was taken completely out of context. Mr. Upshaw testified:

- Q. Would you state whether or not that decision made by the Players Association is permanent in terms of changing your tax status?
- A. As far as changing our tax status, and as far as ever being a labor organization again, that is a permanent status. We have no intentions, in the future or my lifetime, to ever return to be a labor organization again. (Upshaw 234) (Tab 22).

After Mr. Upshaw's use of the term "pending" was pointed out to him, he testified:

When I used the term this morning, pending determination of the Powell litigation, I misspoke. What I meant was because of the Powell litigation we changed our tax status from a labor organization to a business association because there was a permanent change, and that was what I meant, and if I said pending, I misspoke. I definitely meant it was because of the Powell litigation. (Upshaw 235-36) (Tab 69) (emphasis added).

IV. PLAINTIFFS AND THE NFLPA HAVE FULLY COOPERATED IN DISCOVERY

14. Finally, I feel compelled to respond to the defendants' remarkable assertion that the NFLPA "refused to cooperate with the defendants in connection with discovery." (NFL Br. at 2, n.1). This amazing allegation comes after a massive discovery "blitz" in which the defendants have taken 28 depositions in five weeks in 20 cities, all at their request. Even though plaintiffs believed this discovery to be totally irrelevant and duplicative, plaintiffs indicated as early as July 20 their willingness to go forward with all of defendants'

discovery of the NFLPA, without the need for subpoenas. (See correspondence at Tab 70). Ultimately, plaintiffs and the NFLPA agreed to go forward with up to 29 such depositions. (Tab 71). The depositions required a massive logistical effort and were accomplished with complete cooperation of plaintiffs and the NFLPA. The NFLPA also produced more than 1300 pages of documents in response to defendants' discovery demands.

15. By contrast, defendants have refused to proceed with discovery on the merits of this case, forcing plaintiffs to make, and win, a motion to compel before Magistrate Boline. (See Tab 72). Indeed, defendants even refused to produce documents in their files relating to the status of the NFLPA, only reluctantly agreeing to produce such documents after a motion to compel was filed. (See plaintiffs' request, defendants' response and notice of motion to compel at Tab 73).

16. Looking for any excuse to delay a decision on this motion, defendants allege that they "have not completed their discovery on these issues" and that the NFLPA "has continued its refusal to cooperate with defendants on discovery matters." Defendants rely for this assertion on correspondence over oral requests for documents primarily relating to the amount of fees that were expended on the NFLPA's charge in tax status that the NFLPA believe to be completely irrelevant and that the NFL must know have no significance. In any event, these documents either

do not exist or have now been produced. (See Tab ⁷⁴~~73~~). In light of the massive discovery on these issues, defendants' assertion that they "have not completed discovery" on the labor exemption issue is incredible.

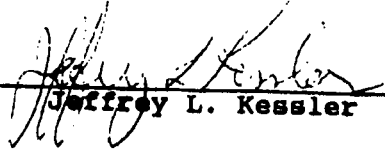
V. DEFENDANTS' DOCUMENT PRODUCTION

17. Defendants complain that documents were not received from the NFLPA until September 19, 1990 (NFL Br. at 1, n.1) but they neglect to mention that despite the fact that plaintiffs' summary judgment motion was filed on August 1, their document requests to the NFLPA were not served until August 24. By contrast, documents responsive to plaintiffs' request for documents relating to the status of the NFLPA, dated September 14, were not received from defendants until Friday, October 26, 1990.

18. Because plaintiffs did not receive the latter documents until last Friday, there has been no time or opportunity to take any discovery about them. However, some thirteen of these documents (Tab 75) are quite startling. Since these documents -- all of which are internal memoranda from the NFL Management Council to individual NFL teams -- reflect not

only the Management Council's knowledge that the NFLPA was withdrawing from all grievance procedures, but its recognition that "the NFLPA has abandoned the representation of NFL players."

NORMA FRANCES SEELEY
NOTARY PUBLIC, State of New York
No. 03-4815529
Qualified in Bronx County
Commission Expires August 31, 1992


Jeffrey L. Kessler

Sworn to before me this
2nd day of November, 1990


Notary Public